EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85- 5186

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SUPREME COURT, U.S.

ROBERT W. SOUTH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTION PRESENTED

I.

DO JURY ARGUMENTS WHICH INFORM THE JURY THAT "EVEN BEHIND ALL OF THAT ... THERE ARE MANY, MANY GUIDELINES, SAFEGUARDS FOR THE DEFENDANT'S BENEFITS" AND "[T]HERE ARE EVEN SAFEGUARDS THAT I CAN'T TELL YOU ABOUT BECAUSE THE LAW SAYS I AM NOT SUPPOSED TO TELL YOU ABOUT THEM" VIOLATE THE NEED FOR RELIABILITY IN THE DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT IN A SPECIFIC CASE BY LESSENING THE JURY'S SENSE OF RESPONSIBILITY FOR DETERMINING THAT A DEFENDANT SHOULD BE PUT TO DEATH AS A PUNISHMENT?

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OCTOBER TERM, 1985

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ROBERT W. SOUTH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Robert W. South would respectfully request of this Court the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina regarding the above-mentioned question presented.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina, State v. South (S.C. Opinion No. 22339, Filed June 4, 1985) has not yet been reported. It is reproduced in the Appendix to this petition at A-1 through A-6.

The per curiam order of the Supreme Court of South Carolina dated July 18, 1985, granting a sixty day stay of execution pending the filing of this petition for writ of certiorari is unreported, and is reproduced infra at A-7.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on June 4, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and herein a deprivation of rights secured by

the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

STATEMENT OF CASE

The Petitioner Robert W. South was arrested in Lexington County, South Carolina, in April, 1983 and charged with the crime of murder in connection with the shooting death of an on-duty police officer. On May 16, 1983, the Lexington County grand jury issued an indictment against the Petitioner for the offense of murder.

The Petitioner's case was called to trial on November 7, 1983. On November 15, 1983, the jury returned a verdict of guilty of murder. South Carolina's capital murder sentencing statute, which is patterned after the Georgia statute considered in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, 462 U.S. 862 (1983), provides for a separate sentencing hearing to be conducted before the trial jury as soon as practicable but not sooner than twenty-four hours after the guilty verdict is returned. In accordance with this statute the trial judge set a sentencing hearing for November 17, 1983.

During the sentencing phase of this bifurcated trial the prosecution presented the following arguments during his final statement to the jury prior to their deliberations as to a sentencing recommendation:

> He will explain to you about the mitigating parts, things that the defense will say you should consider in imposing life imprisonment.

> And even behind all of that there are many many safeguards built into this law. There are many many guidelines, safeguards for the defendant's benefit. And I have no problems with that. I agree with that. I want it that way.
>
> We are talking about the ultimate punishment. There are even safeguards that I can't tell you about because the law says I am not suppose [sic] to tell you about them, and I have no problems with that. I am glad it is that way. [Tr. 2898, l. 19 - tr. 2899, l. 6].

The jury subsequently returned a recommendation for the imposition of the death penalty. The Petitioner was accordingly sentenced to death by the lower court.

HOW THE FEDERAL QUESTION WAS RAISED

Trial counsel for the Petitioner made a motion for a mistrial on the ground that the Solicitor's closing argument had interjected an arbitrary factor into the jury's deliberations on the appropriateness of death as a sentence in this case by inferring that their decision as to the death penalty was not final, inasmuch as it was subject to appellate review through "safeguards" of some undisclosed nature. [Tr. 2955, ll. 7-15]. Said motion was denied by the trial court. [Tr. 2956, ll. 9-13].

On appeal to the South Carolina Supreme Court, Petitioner argued that the jury argument in question impermissibly lessened the jury's sense of responsibility for their death sentence recommendation by inviting the jury to speculate as to the nature of the undisclosed safeguards referenced by the State in its closing statements.

On direct appeal, the South Carolina Supreme Court addressed this issue by stating:

> The next alleged error is the solicitor's reference to procedural safeguards during his sentencing phase summation. Appellant argues this lessened the jury's sense of responsibility, while the State contends the reference emphasized the jury's responsibility. Ordinarily, the trial judge has wide discretion regarding the propriety of arguments. We will not disturb his ruling. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982).
>
> Furthermore, any alleged prejudice was

negated. Appellant's counsel also mentioned such safeguards in his argument. Additionally, the trial judge repeatedly charged the jury concerning their responsibility, and the importance of their decision. State v. South, Opinion No. 22339 (S.C., June 4, 1985), infra at A-5.

The Court does not explain why the prosecutor's argument was less likely to have distorted the jury's deliberations because of anything either defense counsel or the lower court said. Trial counsel's closing argument from the penalty phase is reproduced infra at A-30 - A-72. The trial court's final jury charge in the penalty phase is reproduced infra at A-73 - A-86.

REASONS FOR GRANTING THE WRIT

A. Prior South Carolina decisions illustrate a failure to address the Eighth Amendment violation inherent in the issuance of a death sentence by a jury whose sense of responsibility for that sentencing decision has been distorted by an improper jury argument.

Jury arguments which would lessen the jury's sense of responsibility for the death sentence by referencing matters such as the Solicitor's prior decision to seek the death penalty or the existence of procedural safeguards which provide for a review of the jury's decision were consistently held to be improper in an earlier series of South Carolina death penalty cases. Thompson v. Aiken, _____ S.C. _____, 315 S.E.2d 110 (1984); State v. Butler, 277 S.C. 543, 545, 290 S.E.2d 420 (1982); State v. Sloan, 278 S.C. 435, 441, 298 S.E.2d 92 (1982); State v. Smart, 278 S.C. 515, 526-527, 299 S.E.2d 686 (1982). State v. Koon, 278 S.C. 528, 538, 298 S.E.2d 769 (1982); State v. Plath, 277 S.C. 126, 284 S.E.2d 221, 230 (1981); State v. Woomer, 276 S.C. 258, 269, 277 S.E.2d 696, 702 (1981); State v. Gilbert, 273 S.C. 690, 698, 258 S.E.2d 890, 894 (1979); State v. Tyner, 273 S.C. 646, 658-60, 258 S.E.2d 559, 565-66 (1979).

Subsequently, in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), the South Carolina Supreme Court held that even if referring to "numerous procedural safeguards" did lessen the jury's sense of responsibility, the trial

judge's allowance of the argument in that case did not constitute an abuse of discretion. In Woomer, supra, the Solicitor informed "the jury of the numerous procedural safeguards afforded a capital defendant." 299 S.E.2d at 320. In the Petitioner's case, the South Carolina Supreme Court upheld the death sentence despite the fact that the Solicitor invited the jury to speculate as to what procedural safeguards might exist to provide a review of that sentence by referring to "safeguards that I can't tell you about." Infra at A-13. In so ruling, the Court held "any potential prejudice was negated" by the mention of such safeguards by trial counsel in his closing argument and by subsequent jury charges which instructed "the jury concerning their responsibility and the importance of their decision." Infra at A-5. Said ruling fails to explain how these arguments and instructions mitigated the prejudicial impact of the Solicitor's improper closing argument.

The decision of the lower court fails to address the probable impact juror speculation, as to these undisclosed safeguards, would have on the "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280 (1976).

B. The Court should grant the writ to consider the constitutionality of death sentences issued by juries whose sense of responsibility for that ultimate sentence has been diminished by jury arguments which shift responsibility for that decision to others.

The South Carolina Supreme Court affirmed the Petitioner's death sentence on June 4, 1985. Seven days later this Honorable Court decided Caldwell v. Mississippi, 472 U.S. ____, 86 L.Ed.2d 231, 105 S.Ct. ____ (June 11, 1985). In Caldwell, this Court held that jury arguments which seek "to minimize the jury's sense of responsibility for determining the appropriateness of death" violate the standard of reliability that the Eighth Amendment requires in death penalty cases.

The jury argument in the Petitioner's case was particularly offensive inasmuch as it was vague and suggestive. The charge invited the jury to engage in sheer speculation as to what avenues of relief might be available to the Petitioner if he sought review of their death sentence recommendation through the "safeguards" alluded to by the Solicitor. As noted by this Court in Caldwell, supra, such speculation might lead to a number of totally erroneous conclusions by a juror. "Bias against the defendant clearly stems from the institutional limits on what an appellate court can do - limits that jurors often might not understand." Caldwell, supra, at 86 L.Ed.2d 240.

The State's argument in this case clearly invited the jury to feel less ultimate responsibility for the death sentence. Given the nature of the decision a capital sentencing jury is faced with, a literal choice between life and death, "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell, supra, at 86 L.Ed.2d 242.

The decision of the South Carolina Supreme Court in this case fails to recognize the Eighth Amendment violation inherent in the affirmance of a death sentence issued by a jury whose sense of responsibility for that action has been deteriorated by invitations not to view their decision as final. As noted previously, the argument in question was particularly offensive because it invited sheer speculation concerning possible appellate review of their decision by a lay jury. This Court has consistently held that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446 (1983).

Inasmuch as the Petitioner's death sentence was recommended by a jury whose ultimate sense of responsibility for

the death penalty was distorted by the State's improper and potentially misleading closing argument, this Petition should be granted to halt the Petitioner's execution.

Conclusion

The Writ should properly issue to review the judgment of the lower court.

Respectfully submitted,

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ATTORNEY FOR PETITIONER.

August 2, 1985.

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S. C. COMMISSION OF
APPELLATE DEFENSE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Robert W. South, ...Appellant.

Appeal From Lexington County
John Hamilton Smith, Circuit Judge

Opinion No. 22339
Heard May 6, 1985 - Filed June 4, 1985

AFFIRMED

Attorney General T. Travis Medlock, Assistant Attorney General Harold M. Coombs, Jr., and Staff Attorney Norman Mark Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

Jack B. Swerling, Richard A. Harpootlian; and S. C. Office of Appellate Defense, all of Columbia, for Appellant.

GREGORY, A.J.: Appellant Robert W. South was convicted of the murder of West Columbia Police Officer Daniel Cogburn and sentenced to death. His direct appeal and mandatory review [S. C. Code Ann. § 16-3-25 (1984)] have been consolidated for purposes of this opinion.

Appellant raises numerous allegations of error. We affirm his conviction and sentence.

I. Facts

On April 12, 1983, at approximately 7:30 p.m., Officers Cogburn and Smith stopped an automobile on 9th Street in West Columbia.

Officer Cogburn was sitting on the driver s side of the patrol car writing a traffic citation. A light colored truck pulled up beside Cogburn's car and fired one shot into it, striking Cogburn, who died a short time later.

After a brief chase, the truck collided with another police vehicle. Appellant was the only occupant of the vehicle when this collision occurred. The murder weapon, an M-1 carbine, was also in the truck.

II. Pre-trial Matters

South contends the lower court erred in denying his motion to change venue, claiming a fair trial was impossible in Lexington County due to the media attention and publicity given to the murder. We disagree.

The decision to change venue is within the discretion of the lower court. State v. Thomas, 198 S.C. 519, 18 S.E.2d 369 (1942). We can find no abuse of discretion. The trial judge carefully screened prospective jurors to insure appellant a fair trial. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. A. Allen, 266 S.C. 175, 222 S.E.2d 287 (1976).

III. Jury Matters

During voir dire, the trial judge asked each prospective juror whether they would: (a) always vote for the death penalty; (b) always vote for life imprisonment; or (c) vote for either, depending on the evidence. Appellant claims this inquiry improperly steered the jurors. This contention is without merit.

The trial judge's questions were proper because they insured the jurors could perform their duties as required by law. See State v. Elmore, Davis's Advance Sheets, Op. No. 22322, filed May 16, 1985.

South also contends the trial judge erred in refusing to permit defense counsel to ask the jurors hypothetical questions concerning the death penalty. Clearly, the questions would have been improper since the purpose of voir dire is to insure each juror can make a decision based on the evidence presented, rather than hypothetical evidence.

Next, South alleges the trial judge improperly excluded two prospective jurors because of health and educational conflicts. This was within the trial judge's discretion.

He also complains that certain jurors were improperly excluded because of their views on capital punishment. However, an examination of the entire colloquy reveals the jurors were properly excluded because their views on the death penalty would have substantially impaired the performance of their duties. State v. Elmore.

South proposes we abandon our present capital jury selection process, citing Grigsby v. Mabry, Order No. 83-2113 (8th Cir. January 30, 1985). This proposition is untenable.[1]

Next, appellant argues death-qualified jurors were included in the panel. A review of the entire voir dire reveals the jurors were properly seated. Furthermore, error cannot be assigned in seating jurors because appellant did not exhaust his peremptory challenges. State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960).

Finally, South contends the lower court erred in allowing the jurors to take notes. Such was a proper exercise of discretion. State v. Trent, 234 S.C. 26, 106 S.E.2d 527 (1959).

IV. Evidentiary Matters

South's first assignment of error is the admission of evidence of his 1980 arrest for resisting arrest and disorderly conduct, and subsequent conviction for the latter offense. Under established precedent, the evidence was properly admitted.

The State's theory was that the arresting officer in the 1980 incident, Officer Hall, was South's intended victim, rather than Officer Cogburn. At trial, they offered evidence of the earlier offense, as well as evidence of threats directed at Officer Hall. They also sought to show a physical resemblance between Hall and Cogburn.

Since this evidence demonstrated motive, it was properly admitted. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

South further contends the lower court erred in admitting notes made by Officer O'Neal on the night of appellant's arrest. They concerned incriminating statements made by appellant, and were admitted in addition to O'Neal's testimony. We agree the notes were improperly admitted since they were prior consistent statements, See Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960); however, the evidence was harmless beyond a reasonable doubt since it was cumulative to the abundant amount of similar evidence admitted at trial. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978).

Appellant also claims two statements he made shortly after his arrest were erroneously excluded as self-serving hearsay. He contends they were admissible as res gestae. Neither of the statements were sufficiently contemporaneous with the murder

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[1] See Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984) which also rejected this argument.

to qualify as part of the res gestae. See State v. Blackburn. Furthermore, any alleged error was harmless beyond a reasonable doubt since the statements concerned his claim that an anonymous hitchhiker committed the murder. Abundant evidence on this claim was admitted throughout the trial.

South focuses further assignments of error on the State's reply witnesses. First, he contends the testimony should have been excluded because the State failed to disclose their statements pursuant to the pre-trial discovery order. The order was not violated because it only required the State to produce statements used in its case-in-chief. The order was proper because the rule only requires disclosure of such statements as ordered by the trial judge. Circuit Court Rule 103 (a) (2).

Second, appellant claims the witnesses were outside the scope of reply. Clearly, the witnesses were presented to contradict appellant's testimony. Any arguably contradictory testimony is proper on reply, and the trial judge properly exercised his discretion. State v. Stewart, _____S.C._____, 320 S.E.2d 447 (1984).

Next, South contends certain statements he made to witnesses Boatwright, Sims, Isles, Hall, Harmon and Braswell were erroneously admitted in violation of the discovery order. We disagree.

The statement made to Boatwright was made at the same time as the Sims statement. Since appellant received the Sims statement, the admission of the cumulative Boatwright statement was harmless beyond a reasonable doubt. See State v. Blackburn.

The Harmon, Isles and Hall statements were properly admitted because they were not in response to interrogation. Circuit Court Rule 103 (a) (1) (A).

Appellant's attack on the Braswell statement is based on the State's failure to produce a tape recorded statement in addition to the written statement. This error was harmless beyond a reasonable doubt since appellant received the substantial equivalent in the written statement.

Error is also claimed where the solicitor, in cross-examining appellant, referred to appellant's wife and asked whether she would testify. Appellant contends this violated his rights provided by the interspousal privilege. S. C. Code Ann. § 19-11-30 (1984).

Though the question was improper, the record reveals no prejudice resulted. This brief reference, read in context, created no negative inference.

Next, appellant argues the badge and credentials of officer Cogburn were improperly admitted. Clearly, this admission was proper as proof of the statutory aggravating circumstance. See S.C. Code Ann. § 16-3-20 (C) (a) (7) (1984).

South's final contention is the solicitor erred in mentioning the pregnancy of Cogburn's wife during the course of questioning a witness. This error was rendered harmless beyond a reasonable doubt by an immediate curative instruction by the trial judge.

V. Closing Arguments

First, appellant argues the solicitor improperly argued that acquittal would be tantamount to giving appellant his gun back.

Viewed in context, this argument does not appear to be highly inflammatory. We will defer to the discretion of the trial judge, who's ruling will not ordinarily be disturbed. See State v. Chaffee and Ferrell, Davis's Advance Sheets, Opinion No. 22182, filed November 13, 1984; State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975).

Appellant's next contention is that the solicitor improperly inferred he should have introduced additional evidence if the State's reply witnesses were wrong. An examination of the entire argument in context did not convey such a message.

The next alleged error is the solicitor's reference to procedural safeguards during his sentencing phase summation. Appellant argues this lessened the jury's sense of responsibility, while the State contends the reference emphasized the jury's responsibility. Ordinarily, the trial judge has wide discretion regarding the propriety of arguments. We will not disturb his ruling. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982).

Furthermore, any alleged prejudice was negated. Appellant's counsel also mentioned such safeguards in his argument. Additionally, the trial judge repeatedly charged the jury concerning their responsibility, and the importance of their decision.

Appellant further contends the solicitor improperly argued the verdict would be a message to Lexington County and the State of South Carolina. This contention is meritless. State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). Furthermore, appellant's counsel refused the trial judge's offer of a curative instruction.

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468, 224 S.E.2d 881 (1976).

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of a fair trial. State v. Durden. He has

VI. Jury Instructions

irst contends the trial judge erred in re-
existence of mitigating circumstances as a
State v. Gill, 273 S.C. 190, 255 S.E.2d 455

Gill is misplaced. Gill stands for a narrow
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of mitigation to go to a jury. Nowhere does
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Copeland.

VII. Constitutionality

stitutional attack on the Death Penalty Act
s constitutionality is well settled. State

VII. Statutory Review

iewed the facts of other death penalty cases.
case was appropriate, especially in light of
of provocation on the part of the victim.

, a thorough search of the record reveals no
rs. Appellant's conviction and sentence are

C.J., NESS, HARWELL and CHANDLER, JJ., concur.